

ORIGINAL

GARDNER, CARTON & DOUGLAS

1301 K STREET, N.W.

SUITE 900, EAST TOWER

WASHINGTON, D.C. 20005

(202) 408-7100

FACSIMILE: (202) 289-1504

DOCKET FILE COPY ORIGINAL

WRITER'S DIRECT DIAL NUMBER

Susan H.R. Jones
(202) 408-7108

CHICAGO, ILLINOIS

November 10, 1993

HAND DELIVERED

Mr. William F. Caton
Acting Secretary, Room 222
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Mr. Caton:

Transmitted herewith, on behalf of E.F. Johnson Company, is an original and four copies of Comments filed in response to the Notice of Proposed Rule Making released on October 12, 1993, in PP Docket No. 93-253, In the Matter of Implementation of Section 309(j) of the Communications Act Competitive Bidding.

Please direct any questions regarding this pleading to Russell H. Fox of this office, or the undersigned counsel.

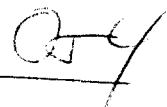
Sincerely,


Susan H.R. Jones

Enclosure

F:\SHJ\LTR\65907.1

No. of Copies rec'd
List ABCDE



**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

Implementation of Sections 309(j))	PP Docket No. 93-253
the Communications Act)	
Competitive Bidding)	
)	
To: The Commission)	

COMMENTS OF THE E.F. JOHNSON COMPANY

The E.F. Johnson Company ("E.F. Johnson" or "the Company"), by its attorneys, pursuant to Section 1.415 of the Rules and Regulations of the Federal Communications Commission ("FCC" or "Commission") hereby submits its Comments in response to the Notice of Proposed Rule Making ("NPRM") adopted in the above captioned proceeding^{1/} which proposes to implement a method by which the Commission may use competitive bidding to award authorizations to employ the radio spectrum, pursuant to Congressional mandate, consistent with new Section 309(j) of the Communications Act of 1934 ("the Act").^{2/}

I. INTRODUCTION

E.F. Johnson is a leading manufacturer of radio communications and specialty products for commercial and public safety use. Founded 70 years ago as an electronic components manufacturer, E.F. Johnson entered the radio communications equipment market in the late 1940's and is one of the three largest providers of land mobile radio

^{1/} Notice of Proposed Rule Making, PP Docket No. 93-253, FCC 93-455, released October 12, 1993.

^{2/} Pub. L. 103-66, Title VI, Part B, Section 6002, 107 Stat 312, 392 (1993).

systems in the United States. E.F. Johnson is one of the leaders in the specialized mobile radio ("SMR") industry, with a significant share of the domestic installed infrastructure and subscriber radio units. The Company has established trunking protocols and open architecture standards with its Clearchannel LTR®, a multichannel trunked radio product.

In this proceeding, the Commission intends to implement provisions of the Omnibus Budget Reconciliation Act of 1993,^{3/} which gives the Commission authority to use competitive bidding to award licenses for use of the radio spectrum. In particular, the new law directs the Commission to employ auctions when: 1) there are mutually exclusive applications; 2) the applications are for an initial license or construction permit; 3) the licensee will offer services to subscribers for profit. Although the Commission proposes auction rules of general applicability, it specifically anticipates applying the rules to certain services immediately, including personal communications services ("PCS"), all common carrier radio services, SMRs, and the Interactive Video Data Service ("IVDS"). Applicants for traditional private radio services would be exempt from auctions.

E.F. Johnson is a licensee of 800 Mhz SMR systems. In addition, it supplies equipment to hundreds of SMR operators and other two way radio dealers throughout the country, who will be dramatically affected by a requirement that they secure by auction, spectrum that they once could employ through the cost of an application. E.F. Johnson, both as a licensee, and through its relationship with its dealers, possesses a uniquely realistic view of the mobile communications industry and how it would be affected by the FCC's auction proposal.

^{3/} *Id.*

While the Commission must employ auctions under the parameters specified by Congress, it should exercise care in crafting its operational definitions. The FCC is authorized to employ the auction procedure for services characterized by paying subscribers and where initial licenses will be awarded. E.F. Johnson supplies products to small and medium sized communications providers. These entities will be disadvantaged if they must bid against those with greater resources in order to stay in business or to naturally increase the size or scope of their operations. Moreover, these small and medium sized companies should be provided with a viable opportunity to offer additional communications services available through the allocation of spectrum to commercial operations. Because E.F. Johnson wishes to ensure that the auction procedures adopted by Commission are equitable for all entities, it is pleased to have this opportunity to submit the following Comments.^{4/}

II. COMMENTS

A. Principles for Determining Whether a License Should be Auctioned

The Act directs that auctions be employed for those channels whose principal use is the transmission or reception of communications signals for profit. The Commission asks, where there is co-mingling of for-profit and not-for-profit service within a class of service, whether the entire class of licensees should be subject to competitive bidding. The Commission correctly notes that blanket application of auction licensing according to class of service could be administratively convenient but could also lead to inequities within

^{4/} E.F. Johnson does not address all aspects of this NPRM. As noted above, its primary concern is the protection of small to medium sized business offering two way mobile communications services.

certain classes of licensees. The FCC cites as an example, spectrum shared between commercial SMR operators and police and fire departments. In addition to public safety, the Commission should note that a variety of businesses employ their communications systems to meet internal communications needs. Such private systems do not have paying subscribers and should not be expected to compete in an auction against commercial communications service providers for the same spectrum. By making the private system operator compete against the commercial provider, the Commission would deprive the private entity of the opportunity to satisfy its own internal communications requirements.

Accordingly, E.F. Johnson recommends that the Commission should not exercise auction authority in services where channels are shared between private systems and commercial operators, and where the essential character of the service is not dictated by one category of license. This rationale should govern particular channels available to private systems at 220 MHz, 800 MHz and 900 MHz, as discussed more fully below. In addition, it is expected that the Commission will "refarm" the spectrum below 800 MHz.^{5/} In those bands, it is likely that the FCC will permit both commercial and non-commercial applicants. Because this spectrum, as well as portions of the bands above 800 MHz have traditionally been employed by private systems, the Commission must not preclude the future use of these channels by private systems by permitting the frequencies to be auctioned.^{6/}

^{5/} Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them, 7 FCC Rcd 8105 (1992).

^{6/} E.F. Johnson notes that there are currently commercial systems operating on a private carrier basis in the 470-51 MHz band. This spectrum is also heavily used to meet companies' internal communications requirements. Accordingly, the
(continued...)

B. Auction Design

The Commission proposes to allow the use of installment payment plans by entities designated by the Act as groups whose economic opportunity should be ensured. The FCC also asks what type of alternative payment methods should be used for these entities. E.F. Johnson believes that a variety of options should be available to these entities. Many for-profit communications entities, including today's SMR operators are small businesses, particularly when compared to those that will likely seek the use of spectrum for commercial purposes in the future. Accordingly, these entities, who have demonstrated the ability to meet consumer needs, but who are otherwise unable to provide lump sum payments, should be allowed a variety of payment options.

The Act requires that the Commission ensure that small businesses, rural telephone companies, and businesses owned by women and minorities are "given the opportunity to participate" in the provision of spectrum based services. E.F. Johnson expresses no opinion as to the character of preferences that should be available to entities other than small businesses. However, the Company strongly believes that creative financing terms, including, but not limited to deferred payment plans, be available to these small business entities.

In order to meet the objectives of the Act, the Commission should employ criteria to define small businesses to ensure that local telecommunications providers can fairly take advantage of the preferences envisioned in the Act. Reliance on the standards established

^{6/}(...continued)

Commission should ensure that these private entities are not required to compete against commercial licenses for the right to employ this spectrum.

by the Small Business Administration would be acceptable. Any consortia created should also meet, in the aggregate, the tests established by the Small Business Administration.

C. Specific Services

1. 220-222 MHz Licenses

The Commission correctly recognizes that there are three distinguishable categories of authorizations that either have been, or will be, issued in the 220-222 MHz band: nationwide non-commercial and commercial services, and local providers. Nationwide non-commercial licensees would fall within the definition of private services that are exempt from auction authority. Commercial nationwide licensees would, by their nature, be contained within the commercial statutory definition and be subject to auctions. The Commission notes that for local 220 MHz licenses, it is unclear whether the service will be used predominantly for commercial or non-commercial purposes. Accordingly, the Commission proposed not to subject local licenses to auction authority. As E.F. Johnson noted above, where spectrum is shared between commercial and non-commercial entities, subjecting the allocation of channels to an auction would frustrate the intent of the allocation scheme by effectively denying access to the frequencies by the non-commercial entities.^{2/}

^{2/} In its discussion of PCS auction procedures, the Commission found that the primary purpose of PCS was likely to be commercial operations. Accordingly, it was correct for the Commission to decide to employ its auction authority. With respect to the 220-222 MHz band, there has been, nor can there, be such an assumption. When the band was allocated, the primary purpose was to make new spectrum available to a wide variety of land mobile uses, employing narrowband technology. The allocation of spectrum to PCS was predicated on the establishment of a commercial service.

As a practical matter, the Commission already selected licensees, and already issued licenses for local 220-222 MHz authorizations. Nevertheless, these licenses may be cancelled for non-construction, making the frequencies available again the same market. In addition, the Commission's method of licensing the spectrum has been challenged in the U. S. Court of Appeals.^{8/} Finally, in due course, the Commission will accept additional applications for 220-22 MHz local channels. The Commission should therefore, establish at this time that local 220-222 MHz channels will not be subject to auction procedures.

2. 800 MHz and 900 MHz SMRs

The Commission correctly recognizes that channels designated for SMR use are generally employed to serve subscribers on a commercial basis. Accordingly, E.F. Johnson concurs that applications for channels dedicated for SMR, or that are mutually exclusive, should be subject to auctions. E.F. Johnson notes that in some instances, applications will specify many frequency assignments, only some of which will be mutually exclusive with frequencies specified on another application. The Commission should conduct an auction only with respect to those particular channels that are mutually exclusive.

Moreover, E.F. Johnson notes that only applications for an initial authorization should be subject to auction authority. In the Nos. 93-144 and 89-553 proceedings^{9/} the Commission will potentially make available spectrum to entities that are already licensed

^{8/} Evans v. FCC, No. 92-1317 (D.C. Cir. filed September 8, 1993).

^{9/} Amendment of Part 90 to Facilitate Future Development of SMR Systems in 800 MHz Frequency Band, 8 FCC Rcd 3950 (1993); Amendment of Parts 2 and 90 to Provide for Use of 200 Channels Outside Designated Filing Areas in 896-901 MHz and 935-940 MHz Bands Allotted to SMR Radio Pool, 4 FCC Rcd 8673 (1989).

for a particular set of channels in a market, with an opportunity to expand the geographic area throughout which the channels are employed. For example, in the proceeding creating Enhanced Mobile Service Providers ("EMSPs"), the Commission would permit existing licensees to apply for the use of channels for which they are already authorized throughout a geographic area. Accordingly, it is likely that there will be instances where more than one licensee wishes to employ the channels throughout the broader geographic area. In that instance, and in similar circumstances where existing licensees are competing for the use of channels over a broader geographic area, the applications should be considered as modification of a current authorization, and not within the scope of the Commission's auction authority. In instances where new applicants apply for use of channels in unserved areas, E.F. Johnson recognizes that the use of auctions would be mandated by statute.

Therefore, in the Docket No. 93-144 proceeding, initial EMSP applications may not be subject to auction authority, because the applicants will be existing licensees. However, in subsequent licensing phases, where applicants will be permitted to request the use of up to 42 unused channels, the employment of auctions would be appropriate. In the Docket No. 89-553 proceeding, it is unclear whether existing licensees will have an opportunity to expand the geographic area over which they are currently licensed, or whether new entrants and existing licensees will compete for currently unlicensed areas. To the extent that there is no preference for existing licensees, the use of auctions would be appropriate, because each entity would be applying for a new license. If an existing licensee is provided with an opportunity to apply for its channels throughout a broader geographic area, there should be

no conflict, because unlike the 800 MHz case, there is only one licensee per authorized channel block in an area today.

3. General Category and Intercategory Sharing

The Commission correctly recognizes that General Category channels, and channels available through interservice sharing, are used by both SMRs and non-SMRs. E.F. Johnson concurs with the Commission that channels in neither category should be subject to auctions. As noted above, mutually exclusive applications may be submitted for the same frequency assignments by both commercial and non-commercial entities. To require competitive bidding to choose between the two entities would not be within either the spirit or letter of the new provisions of the Act.

4. Other Private Radio Services

E.F. Johnson agrees with the Commission that where spectrum may be used for both "private" and subscriber based services, it should not employ auction authority. This analysis, as noted above, is valid for the 470-512 MHz band, in which both commercial and non-commercial operations can be established on exclusive channels. However, because the channels were not initially, nor primarily dedicated for subscriber operations, they should not be subject to auctions. Similarly, the Commission intends to "refarm" channels below 800 MHz, and make the spectrum available on an exclusive basis. Applications for those "refarmed" channels, if they are available to both commercial and non-commercial entities, should not be subject to auction authority.

III. CONCLUSIONS

E.F. Johnson submits that auction authority should not be employed for mutually exclusive applications in services where there is co-mingling of commercial and non-commercial operations. Certain 220 MHz, 800 MHz, 900 MHz and private radio spectrum in the bands below 800 MHz would fall within this category. Moreover, the Commission must exercise care that existing licensees have the ability to expand their current operations without being required to compete with new, better funded entrants. Where competitive bidding will occur, the Commission should ensure the ability, as Congress directed, of small businesses to participate in securing licenses to operate these new services.

WHEREFORE, THE PREMISES CONSIDERED, The E.F. Johnson Company hereby submits the foregoing Comments and urges the Federal Communications Commission to act in a manner consistent with the views expressed herein.

Respectfully submitted,

THE E.F. JOHNSON COMPANY

By: 
Russell H. Fox

Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900, East Tower
Washington, DC 20005
(202) 408-7100
Its Attorneys

Dated: November 10, 1993

F:\RH\PLD\65531.1